No. 160.

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JAMES H. McKEN

Brief of Flansburg for Appellee

Filed Nov. 29, 1897.

IN THE

SUPREME COURT

OF THE UNITED STATES.

OCTOBER TERM, 1897.

No. 160.

AUGUSTUS T. GRUETTER & CHARLES F. JOERS,
Appellants,

vs.

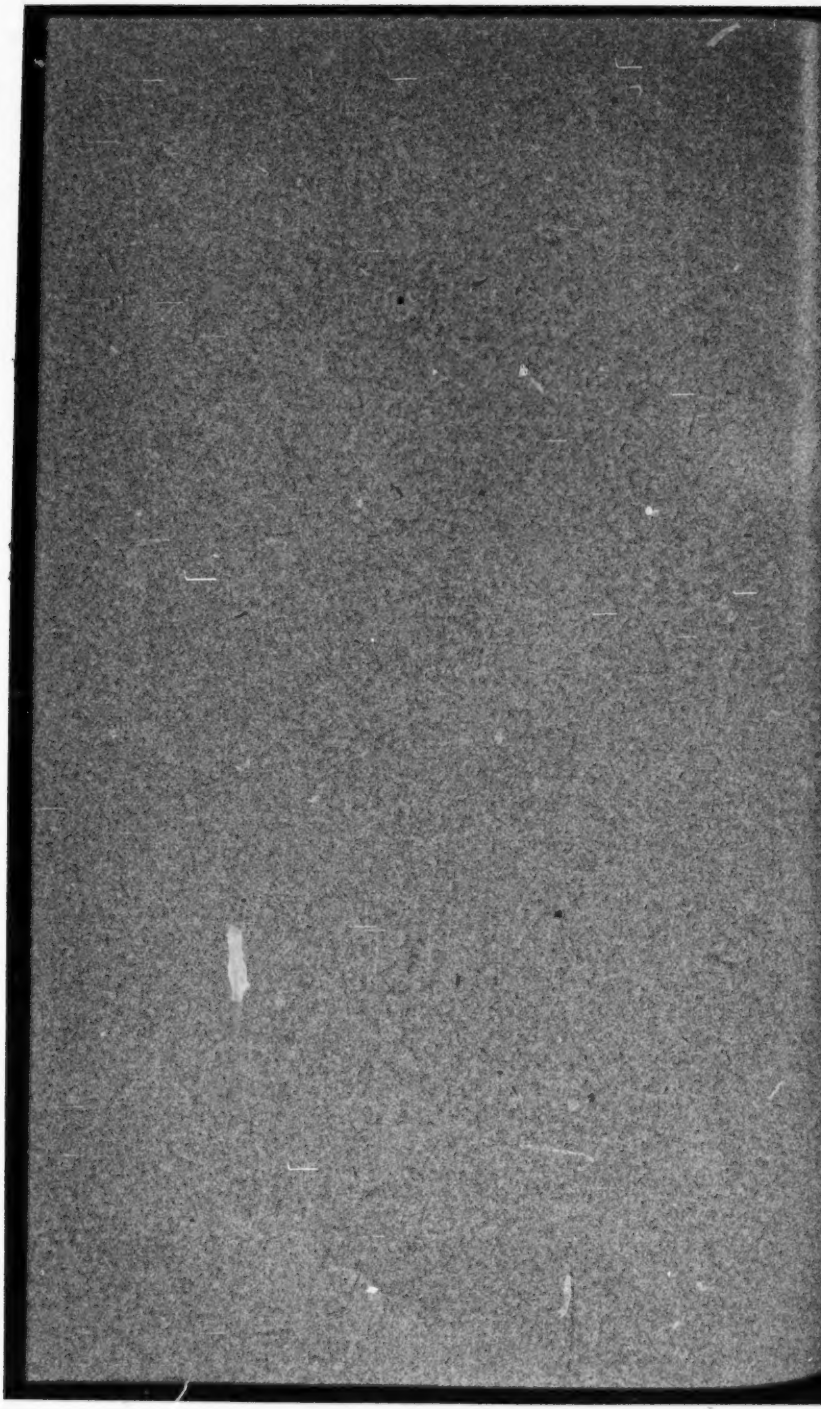
A. P. S. STUART AND KENT K. HAYDEN, RECEIVER OF THE CAPITAL NATIONAL BANK OF LINCOLN, NEBRASKA,
Appellees.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS, FOR THE EIGHTH CIRCUIT.

BRIEF OF APPELLEE.

C. C. FLANSBURG,
Counsel for Appellee, A. P. S. Stuart.

JACOB NORTH & CO., PRINTERS AND STATIONERS, LINCOLN, NEB.



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AUGUSTUS T. GRUETTER AND CHARLES F. JOERS,
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A. P. S. STUART AND KENT K. HAYDEN, RECEIVER OF THE CAPITAL NATIONAL BANK OF LINCOLN, NEBRASKA,
Appellees.

APPEAL FROM THE U. S. CIRCUIT COURT APPEALS 8TH CIRCUIT.

ARGUMENT.

The court of appeals denied to Gruetter & Joers the relief sought by them in this suit on two grounds: *first*, because the facts therein would not entitle them to relief at the hands of a court of equity; *second*, that the pleading filed by them was not a cross bill.

By the petition filed in the district court of Lancaster county, Nebraska, on January 23, 1893 (record, 89) the cause of action stated was that Ambrose P. S. Stuart falsely and fraudulently, and for the purpose and with the intent to cheat and defraud plaintiffs (Gruetter & Joers), represented and stated to the said Gruetter & Joers that the

said Stuart well knew the condition of the bank and the value of said shares of stock, and the said stock was fairly and reasonably worth the sum of $125 per share, or $18,000 in full; that plaintiffs were then about to sell their real estate, and did sell the same to the defendant at an agreed price of $37,500, subject to an encumbrance of $30,000, and received from the defendants an assignment of said stock as and for the sum of $18,000, as part of said purchase price; that the bank was, prior to January 23, 1893, insolvent, and at the time of making said representations by the said Stuart, and at the time of the assignment by Stuart of the stock to Gruetter & Joers, the said Stuart well knew that the bank was wholly insolvent and unable to pay its debts, which is followed by a prayer for damages in the sum of $18,000, the value of the stock.

It was the ordinary action of deceit for false warranty or false representations.

Afterwards, and pending this suit, the receiver filed his bill in the circuit court, seeking to recover the assessment from Stuart; and Gruetter & Joers, on February 24, 1894, filed an answer (record, 11) to this bill of the receiver, admitting and confessing all the allegations of the said bill, and joined in asking that relief be granted the receiver as prayed for by him.

Afterwards, and on the 20th day of March, 1894, Gruetter & Joers filed a pleading, termed a *cross bill* (record, 19), in which they sought to compel the payment to them of $18,000 by Stuart, because of alleged fraud on his part in representing the value of said stock. It will appear from

an examination that by the pleading, termed a cross bill, Gruetter & Joers ask that the title to the stock be decreed to be in Stuart; and that he then be required to pay the amount of the assessment, but without any tender of the bank stock nor offer on their part to pay back his cash and place him in the position he was before the contract was made. Nor do they seek title to their own property conveyed to him in exchange for the bank stock and cash.

An action at law for damages on a contract alleged to have been obtained by fraud is inconsistent with a suit in equity for rescission of the same contract; and, as the party injured cannot have both, but must elect between them, if he pursues his legal remedy for damages at law, he affirms the validity of the transfer, and no tender is necessary. If he proceeds in equity for a rescission he must first tender back or offer to return what he has received under the contract.

A party to a contract must accept it in its entirety. He cannot retain the benefits and reject the burdens of it. If any portion of the contract is affirmed, or a claim asserted to any benefit under its terms, then it must be accepted in its entirety. They cannot both affirm and repudiate, or do a part of both. Equity will not permit them to retain so much of the contract as may be advantageous, and reject the balance. If they repudiate it, it must also be in its entirety. If they retain the cash, they must retain the stock as well. They cannot place the title to the stock back in Stuart and retain the $19,500 in cash.

It rested entirely with Gruetter & Joers in the first in-

stance to tender back the stock and the money received, and demand back the property exchanged; or they had the right to retain the stock and seek their remedy in damages for its value.

These remedies are, however, inconsistent. The party who has the right of election must make his choice, for where there are two inconsistent rights presented to the choice of a party, he cannot enjoy both, but must accept or reject one or the other.

Peters vs. Bain, 133 U. S., 670.

He cannot take the benefits under a contract and then repudiate it, as attempted by this cross bill. If rescission is sought, tender must be made. If damages are sought, it affirms the validity of the transfer. The authorities to support this proposition are numerous and uniform.

Garland vs. Bowling, 1 Hempst. (U. S.), 710.
Burnett vs. Stanton, 2 Ala., 181.
Johnson vs. Walker, 25 Ark., 196.
Ellington vs. King, 49 Ill., 449.
Jarrett vs. Morton, 44 Mo., 275.
Manahan vs. Noyes, 52 N. H., 232.
Moore vs. Bare, 11 Ia., 198.
Potter vs. Titcomb, 22 Me., 300.
Handforth vs. Jackson, 150 Mass., 149.
Brown vs. Witter, 10 Ohio, 142.
Stanton vs. Hughes, 97 N. C., 318.
Lane vs. Latimer, 41 Ga., 171.
Doughton vs. Bldg. Assn., 41 N. J. Eq., 556.
Blake vs. Nelson, 29 La. Ann., 245.

Williams vs. Wilson, 1 Dana (Ky.), 157.
Bell vs. Hartman, 9 Phila. (Pa.), 1.
Hammond vs. Buckmaster, 22 Vt., 375.
Masson vs. Bovet, 1 Denio (N. Y.), 69.
Griffiths vs. The Bank, 6 Gill & J. (Md.), 424.
Calhoun vs. Davis, 2 Ind., 532.
Red Jacket vs. Gibson, 70 Cal., 128.
Cooke vs. Rux, 34 Miss., 105.

The validity of the transfer, however, was affirmed by the suit for damages; and having once elected to proceed for damages, they cannot subsequently rescind. Whenever a contract is alleged to have been obtained by fraud and deceit, the party injured has only one of two remedies: an action at law for damages, or suit in equity for rescission. As they are inconsistent he cannot have both, but must elect between the two. He may have his legal relief for damages at law, or his equitable redress by rescission in chancery. He cannot have damages in equity nor rescission at law, and an election by seeking damages in a court of law concludes the party from afterwards seeking rescission.

Moore vs. Noble, 63 Barb., 435; 36 How. Pr., 385.
Pierce vs. Carey, 37 Wis., 232.
Martin vs. Edwards, 11 Hump. (Tenn.), 374.
Hubbell vs. Meigs, 50 N. Y., 487.
Ernsworth vs. Barton, 60 Mo., 511.
Cooper vs. Landon, 102 Mass., 58.

But even if they could rescind, in no event could they do so without tendering back to Stuart the money they received

from him and the bank stock, putting him in the condition he was in before the transfer was made.

Counsel, in argument and discussion of the case at bar, contended that it was unnecessary to tender back anything, but that the action might proceed without such tender or offer to pay, and cited in support thereof the case of *Martin vs. Roberts*, 5 Cushing, 126. But the case is not an authority in point. That was a *common law action in assumpsit.* It did *not seek a rescission*, but simply sought to recover the amount of the damages sustained, the price of the article sold. In that case a certain article had been sold and the vendor had received in payment a promissory note, the maker of which was represented to be solvent, together with an order on a third person for goods, which latter was duly paid. The vendor *returned the note* to the vendee, on discovery of the fraud, and brought a suit in assumpsit for the balance. But clearly that authority is not applicable to a suit in equity. That was a suit for damages. In a case at *law*, the contention of the appellees would be good. We admit that where a thing is worthless it is not necessary to return it. But the $19,500 cash was certainly not worthless; why was it not returned? We say that in equity the vendee upon rescission *must always return or offer to return what he has received*, although the rule at law is different, as we will presently show.

Counsel also cited the case of *Babcock vs. Case*, 61 Penn. St., 427.

In this case Babcock sold certain land and represented that the title was good and that the land was all right, say-

ing that he had examined it. The land was held by Babcock on a tax title, and after he sold it the title based on a tax deed failed and action was brought *in equity* against Babcock to rescind, and the court held that no reconveyance of the land was necessary, because it had been held by Babcock on a tax title which was worthless, and a deed reconveying to Babcock would in effect convey nothing.

The case of *Pierce vs. Wood*, 23 N. H., 519, was also cited by counsel. The facts in that case were that a party had effected a compromise of his debts by fraudulent representations and procured a discharge of the same by paying a per cent thereon. The creditor, discovering the fraud, brought an action *at law in assumpsit* to recover the balance of the amount due, but did not repay or offer to return the per cent which he had received. The court (page 534) says:

"The doctrine of rescission of contracts will hardly apply to a case of this kind. The whole foundation of the plaintiffs' right to recover rested upon the question of fraud. If fraud was made out, then the plaintiff could recover, otherwise not, and the whole trial proceeded upon that ground. Fraud being established, the compromise was void, and the entire debt would be at once revived and a clear right of action existed in his favor. And it appears to us it would be a singular doctrine to hold that before an action can be maintained to recover the balance, that portion of the plaintiff's demand which had been paid must first be refunded, and that before he can institute a suit for the amount out of which he has been defrauded he must first pay back that which, so far as he is concerned, he has honestly received. Such a rule would be offering a premium for fraud, and in most cases of this kind the plaintiff might better retain the per cent which he has received than relinquish that for the uncertainty of recovering the whole."

These authorities have no application at all, we contend, for they were all brought, with the exception of the Pennsylvania case, in a court of law, and affirmed the validity of the contract, but sought damages. In the Pennsylvania case the court held that it was unnecessary to reconvey, as a reconveyance would have been simply a nullity. In cases of this kind, where the action is at law, no return or offer of return is necessary, as, by bringing an action at law, the plaintiff elects to retain the title, but seeks damages for the fraud and misrepresentation.

Here, however, Gruetter & Joers come into a court of equity asking a money judgment and execution by the prayer of their alleged cross bill, although in a court of equity they neither return nor offer to return what they received under the contract which they now seek in part to avoid. If rescission is the object sought, their alleged cross bill must fail for want of equity, because there is no payment back of the money, or offer to return the consideration. If, on the other hand, it is for damages, it is a suit at law, and they have their adequate remedy under the action properly brought for damages for the deceit. Relief in damages is not cognizable, however, in this court of equity.

In *Miller vs. Barber*, 66 N. Y., 564, the supreme court says:

"The action was for relief, and judgment was demanded for damages sustained by the plaintiff. If the action had been brought upon the promise which the law implies against a fraudulent vendor of real or personal property to restore the consideration paid by the vendee, upon his electing to rescind the contract, the plaintiff would have been

bound to aver and prove that upon the discovery of the fraud he had returned or offered to return what he had received upon it; but an action for damages for the deceit is brought consistently with an affirmance of the contract of sale."

In *Cooper vs. Landon*, 102 Mass., 58–60, the supreme court says:

"Accordingly, when a vendor is sued for making statements in respect to the quality of the article sold by him which are not according to truth, if the vendee desires to charge him in tort, he alleges that a *false representation was made* by him, but if he desires to charge him in contract, he alleges a *promise that was broken*. The word "represent" does not import a promise; on the contrary, it gives notice that fraud is alleged, and that the pleader has taken upon him the burden of proving a scienter."

There can be no relief in equity where the plaintiff has a plain, adequate, and complete remedy at law.

In *Sears vs. The City of Boston*, 16 Pick., 357, the court says:

"If he has sustained any damage by failure or non-performance of the contract, it might be fully compensated in damages,"

And hence there is no relief in equity. See also:

Howe vs. Nickerson, 14 Allen, 400–406.

It will be observed that the object of the alleged cross bill is not to avoid the effect of the contract itself in its entirety. In effect the pleading alleges that the contract of exchange between the parties is valid so far as it places the

title to the realty in Stuart, and to that extent it should stand; but that they should be paid $18,000 and interest, which they allege Stuart has failed to pay under the contract, because the bank stock taken at that price has proven worthless. If by their action they seek to *defeat the entire transaction*, before they can do that they must have offered to rescind; they must be willing to do equity if they seek it; they must put us back into the position in which we originally were. Neither can the court make a new contract for us, and require the payment of cash where we had agreed to exchange property. It could not enforce the original contract, for we have fully performed that. It can not give damages for the fraud, as that is the province of the court of law. If the defrauded vendees had sought rescission, that election rested with them. The vendor can not choose.

In the case of *Mills vs. Knapp*, 39 Fed. Rep., 595, Blatchford, Judge, says:

"Besides this, the plaintiff on the face of his bill has a plain, adequate, and complete remedy at law. He declares in his bill that the amount he is entitled to recover is $8,221.16, as of October 12, 1871. He asks for no discovery. He shows that no accounting under the direction of the court is necessary, for he makes the accounting himself in his bill. The prayer that the defendant may 'account for and pay over such amounts and profits,' which he fixes at a specified amount, is no more than the prayer that the defendant pay over such specified amount. No other equitable relief is asked. In such a case it is not necessary that an objection should be taken *in limine* in the answer. It is taken at the hearing, and that is sufficient. This is not a case where it is competent for a court of equity to grant the relief asked."

See also:

The Insurance Co. vs. Stockton, 38 Fed., 378.

But it was contended by the appellants that there is a concurrent jurisdiction in equity in a case of fraud, even where there is a plain, adequate remedy at law. On this point we submit that such is not the rule.

Suter vs. Matthews, 115 Mass., 253–255.
Jones vs. Newhall, 115 Mass., 244–249.

B.

A respondent filing an answer confessing the allegations of the bill is not entitled to file a further pleading in which he seeks to litigate independent controversies with his co-respondents, in which complainant has no interest, and in which no relief is sought against him.

The circuit court of appeals held that the pleading filed by Gruetter & Joers in this case, and denominated by them a cross bill, was not such in fact. The receiver, in his original bill, sought to set aside the transfer of Stuart to Gruetter & Joers, and to collect the assessment from Stuart, upon the stock so transferred, on the ground that he had transferred it to escape his individual liability, and cheat and defraud the bank by substituting Gruetter & Joers, irresponsible stockholders in his stead, all of which Gruetter & Joers by their answer confessed to be true, and joined in asking that the relief for which the original bill prayed should be granted. After having made this answer the court held they could not file an independent pleading terming it

a cross bill, alleging therein the transfer of stock was as to themselves void, because of fraudulent representations made by Stuart to induce them to make the trade, and they were not under it entitled to a decree setting aside the transfer as to them, or entitled to a judgment entered in their favor against Stuart for the amount at which the stock had been received by them in trade. The court below refused to entertain and consider this pleading, on the ground that it was not a cross bill; it was not brought in aid of their defense to the original suit, for they had confessed the allegations of the original bill, and thereby admitted they had no defense. It was not necessary to obtain a complete determination of the controversies between the receiver and Stuart because those issues would be necessarily completely disposed of by the decision upon the bill itself which by their answer stood confessed. Their pleading, although in a measure connected with the general subject of the original bill, interposed a new controversy between co-defendants to the original bill, the decision of which was unnecessary to the complete determination of the controversy between complainant and defendants over the subject matter of the original bill. This made it an original bill, and the court dismissed it because there could not be two original bills in the same cause.

The cross bill attempted to litigate an independent matter between Gruetter & Joers and Stuart and to procure a settlement of the differences and issues between themselves, n no wise connected with the original bill. It only referred to the receiver by admitting that he was appointed as such, but no demand against him was made in their cross bill. The bill brought by the receiver was an equit-

able one, the action set up in the alleged cross bill was purely a legal demand, and respondent is certainly entitled to no relief by way of cross bill, unless it becomes necessary to obtain such relief against complainant and respondents to completely and thoroughly determine the cause made by the complainant in his bill. And this certainly is unnecessary on behalf of the respondent, who has confessed every allegation. The authorities are numerous and uniform to the proposition that a cross bill can never be made the instrument for determining independent matters. The receiver had no interest whatever in this independent controversy between Gruetter & Joers and Stuart. It was a new and several controversy. In the court below it was admitted that the suit for $18,000 was pending in the state court, but it was denied that it was an affirmance of the transfer of the stock, but it was claimed a distinct repudiation of it. In the brief below counsel referring to the suit says:

"Had it not been for the fact developed later that shareholders are liable to an assessment by the comptroller of the currency, that action would have afforded cross complainants a complete remedy, and their recovery upon the above facts cannot be doubted. But the fact of the assessment put an entirely different face upon the matter. It would be a very slight advantage to Gruetter & Joers to recover the $18,000 residue of purchase money, if they should be compelled to pay the receiver $15,000 and interest as an assessment upon the shares of stock."

So that it would appear that the action in the state court was brought in the belief that it furnished a complete remedy. They kept the bank stock. They were satisfied to retain it, but brought their suit in damages for the deceit.

They had no idea at the time that the bank would not pay out. No one expected an assessment. It is clear from this fact that it was not within the contemplation of the parties. After the assessment was made, then the thought of escaping it seems to have been the motive that prompted the filing of this alleged cross bill. They had, however, exercised their election to recover damages. They had deliberately acted, upon the discovery of the fraud, and whether their action would furnish a complete relief or not, they were bound by the consequence of their voluntary act in bringing the action for damages. The matter in this alleged cross bill was not necessary to a defense in the original bill, but was entirely foreign to it. It was in no sense auxiliary to the proceeding in the original suit, or a dependency upon it. They did not seek discovery, nor were they asking for an accounting, for the amount alleged to be due was clearly set forth by Gruetter & Joers, who made the accounting themselves. It was a new and distinct matter, not within the scope of the original bill; and while it perhaps grew out of the transaction which was the basis of the bill, Gruetter & Joers had put it out of their power to seek equitable relief by the bringing of the suit for damages.

The circuit court for the southern district of Alabama, in the case of the *Fidelity Trust and Safety Vault Co. vs. The Mobile Street Railway Co.*, 53 Fed. Rep., 852, speaking through Judge Toulman, says:

"A cross bill can be sustained only on matters growing out of the original bill and embraced in it. It cannot be used as a means of obtaining relief in respect to a cause of action wholly unconnected with the complainant's cause of action. Neal vs. Foster, 34 Fed. Rep., 496; Rubber Co.

vs. Goodyear, 9 Wall., 807; Manufacturing Co. vs. Prime, 14 Blatch., 371; Cross vs. De Valle, 1 Wall., 1 Story Eq. Pl., Sec. 389; Stonemetz Printer's Mach. Co. vs. Brown Mach. Co., 46 Fed. Rep., 851.

"The purpose of the original bill in this case is to foreclose a mortgage executed by the defendant to the complainant as trustee for the holders of the defendant's bonds. The petition, in the nature of a cross bill filed by F. J. Gasquet and others of said bondholders, is chiefly for the purpose of recovering damages of the complainant for alleged negligent or improper execution of the trust, and by which it is claimed petitioner sustained large damages. *This petition presented as a cross bill offends against the well settled rule which forbids the introduction into such a bill of any new and distinct matter not within the scope of the original bill. The matter set up in the cross bill is not necessary as a defense to the original bill, but is indeed matter entirely foreign to the primary object of the bill.* My opinion is that it is really an original, independent bill."

Stonemetz Printer's Mach. Co. vs. Brown Mach. Co., 46 Fed. Rep., 851.

C.

The fact that citizens of one state are both sued as respondents in one bill in the circuit court does not confer any power on them to litigate controversies between themselves which they could not have litigated by original bill in that court.

There was no federal question involved in the issues of the cross-bill. The right of Gruetter & Joers did not depend upon the construction of any act of Congress, or the constitution, but the sole question in this alleged cross bill was whether fraud was practiced by Stuart against them suffi-

cient to warrant recovery by them of damages. As Gruetter & Joers and Stuart were all citizens of the state of Nebraska, and so shown to be by the pleadings, and the matter being an independent controversy, unconnected with the subject matter of the receiver's bill, the court had no jurisdiction over the alleged cross bill, and the circuit court of appeals did right in so holding and dismissing the same.

The case of *Vannerson vs. Leverett* in the United States circuit court for the southern district of Georgia, 31 Fed. Rep., 376, is a case similar to the one at bar. It was a creditor's bill filed against Vannerson and Leverett. Vannerson filed a cross bill against his co-defendant, Leverett, seeking to obtain relief in a certain alleged indebtedness which existed between themselves. Leverett filed his plea to the jurisdiction of the United States court, averring that both he and Vannerson are citizens of Georgia. There was a demurrer to the plea on the ground that the bill filed by the complainant was a creditor's bill, and that the jurisdiction of the court with such a bill did not depend upon the citizenship of the parties. The court says (page 377):

"If it be true that Vannerson and Leverett are both citizens of Georgia, the one can have in this court no relief against the other in a cross bill filed to an original bill against them both, *which he could not have obtained by original bill here.* In other words, the fact that they are both sued in one bill here does not confer any power on them to litigate their controversies *inter sese* in this court. Most clearly, if the plea is true, Vannerson has no standing in this court as a suitor by original bill. He prays no relief against Bates, Reed & Cooley. His cross bill has no relation to the subject matter of this suit, nor is this cross bill in any sense a reply to the allegations of the original bill.

The circuit court of the United States is limited in its jurisdiction, and when it does not obtain, it is an inflexible rule that the judicial power of the United States must not be exerted, even if both parties desire to have it exerted. Railway Co. vs. Swan, 111 U. S., 379; 4 Sup. Ct. Rep., 510; Cross vs. De Valle, 1 Wall., 5. The argument that the original bill was a creditor's does not and cannot enlarge the jurisdiction of the court so limited; nor does the argument *ab inconveniente* of the solicitor for the complainant have any place in such a court."

In any view of the case, and upon any theory, the decree and finding of the circuit court of appeals as to the alleged cross bill of Gruetter & Joers is correct, and the decision should be affirmed.

C. C. FLANSBURG,
Counsel for Appellee, A. P. S. Stuart.

November 15, 1897.

No. 151.

Brief of Lambertson v. Harvey for Appellee

DEC 2 189
JAMES H. McKENN

IN THE

Supreme Court of the United States.

Filed Dec. 2, 1897.

No. 151.

AMBROSE P. S. STUART,
Appellant,

v.

KENT K. HAYDEN, RECEIVER OF THE CAPITAL NATIONAL BANK OF LINCOLN,
Appellee.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF OF APPELLEE KENT K. HAYDEN, RECEIVER OF THE CAPITAL NATIONAL BANK.

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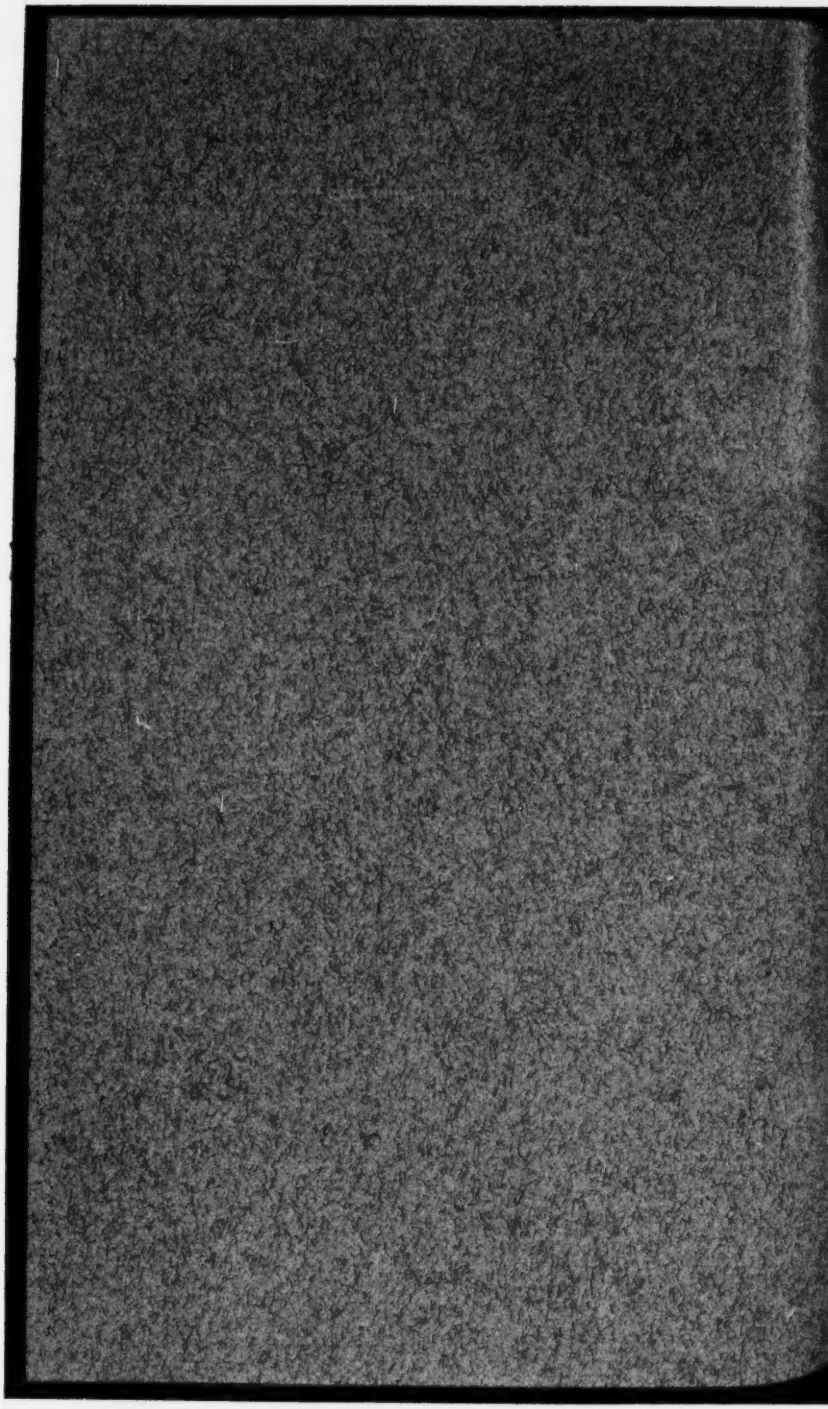
A. E. HARVEY,
F. M. HALL,
Solicitors for Kent K. Hayden, Receiver.

STATE JOURNAL CO., PRINTERS AND STATIONERS, LINCOLN, NEB.



In the Supreme Court of the United States.

OCTOBER TERM, 1897.

AMBROSE P. S. STUART,
Appellant,
v.
KENT K. HAYDEN, RECEIVER OF THE CAPITAL NATIONAL BANK OF LINCOLN, NEBRASKA,
Appellee.
No. 151.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF OF APPELLEE KENT K. HAYDEN, RECEIVER OF THE CAPITAL NATIONAL BANK.

The appellee Kent K. Hayden was complainant in the court below. In his amended bill he alleges:

1. That the Capital National Bank failed and became insolvent on the 23d day of January, 1893; that the comptroller of the currency appointed John D. Macfarland receiver of said bank on or about the 1st day of February, 1893; that on the 31st day of May, 1893, he was succeeded by Kent K. Hayden, who entered upon the duties of his office as receiver on the 1st day of June, 1893.

2. That on the 10th day of July, 1893, the comptroller made an order directing the receiver to call an assessment on all of the stock to the amount of one hundred cents on the dollar.

3. That on the 24th day of December, 1892, the respondent Ambrose P. S. Stuart was a stockholder in said Capital National Bank, and there was standing in his name on the books of said bank one hundred and fifty shares of stock; that on said date the said bank was in a failing condition, was insolvent, which was known to the said respondent Stuart, personally, also officially as director of the Capital National Bank.

4. The bill further avers that the respondent Stuart, with full knowledge of the failing condition and insolvency of the bank, and in expectation and anticipation of its early and near approaching failure, and the necessary enforcement of his liability as a shareholder, and to defraud said bank and its depositors and creditors, and to render it impossible in case of a failure of the bank (which said Stuart believed, and had reason to believe was imminent and could not be long delayed) and to place it out of the power of the comptroller to enforce the liability of said Stuart upon his stock in case of a failure of the bank, and for the purpose of avoiding his liability, and of cheating and defrauding the said bank and its depositors and creditors, did on the 3d day of January, 1893, sell and cause to be transferred on the books of said bank, by proceedings regular in form, but which in fact were illegal, null, and not made in good faith, to Gruetter & Joers, who were pecuniarily irresponsible and unable to pay the amount of said assessment.

5. The bill alleges that by reason of the pretended sales and transfers of said stock by said Stuart to Gruetter &

Joers, and the insolvency of the said Gruetter & Joers, the said complainant is deprived of his remedy at law for the collection of his said assessment.

6. The receiver prays in his bill that said Stuart be required to make full, true, and direct answer to all matters and particulars charged in the bill, as fully, distinctly, and particularly as if he were distinctly interrogated in the bill, and also prays that the court decree Ambrose P. S. Stuart to be the legal owner of said shares of stock, and that the transfer to said Gruetter & Joers be set aside and the respondent Stuart be decreed to pay the complainant the amount of said assessment, together with interest from the 10th day of July, 1895.

7. When the original bill was filed Gruetter & Joers were not made parties defendant, and a demurrer was interposed to the bill chiefly on that ground, and pursuant to the requirement of the circuit court Gruetter & Joers were made parties defendant. Gruetter & Joers were in this way brought in at the instance of defendant Stuart.

A decree was entered as prayed for Kent K. Hayden, receiver, both in the circuit court and in the court of appeals. This appeal is brought to reverse that decree.

I.

The transfer by Stuart of one hundred and fifty shares of stock in an insolvent national bank to escape his liability as a stockholder is void as to the creditors of the bank, and the receiver of the bank may sue the transferrer to recover an assessment made by the comptroller on the stock.

A stockholder in a failing corporation, or who, in view of impending insolvency of the corporation, for the purpose of escaping the liability of a shareholder, transfers his stock, can, notwithstanding such transfer, be held for a stock assessment.

This is sustained by Cook on Stockholders, secs. 263 and 265:

> In the United States a transfer of shares in a failing concern, made by the transferrer with the intention and for the purpose of escaping liability as a shareholder, to a person who for any cause is incapable of responding in respect of such liability, is void, both as to creditors of the company and to other shareholders; and that, too, although, as between the transferrer and transferee, the transaction may have been absolute and no secret trust involved.
>
> See the large number of cases cited in the footnote.

The rule announced in *Bowden v. Johnson*, 107 U. S., 251, is as follows:

> Where a holder of shares of stock in national bank, who is possessed of information showing that there is good ground to apprehend the failure of the bank, colludes with an irresponsible person with the design of substituting the latter in his place and thus escaping his individual liability as imposed by section 12 of the act of June 3, 1864, and transfers his shares to such person, the transaction is a fraud upon the creditors, and the liability of the transferrer to them is not thereby affected.

While the court decides that where transferrer colludes with an irresponsible person he cannot escape his individual liability, yet it cannot be said that the court held *that it was necessary* to allege or prove the collusion of the stockholder with his transferee in order to recover.

In *National Bank v. Case*, 99 U. S., 631, the court say:

> We have, then, only to inquire whether the bank succeeded in throwing off that liability by its transfer to its clerk, Waldo. It certainly did not thereby divest itself of its substantial ownership. It is not every transfer that releases a stockholder from his responsibility as such. While it is true that shareholders of the stock of a corporation generally have a right to transfer their shares, and thus disconnect themselves from the corporation and from any responsibility on account of it, it is equally true that there are some limits to this right. A transfer for the mere purpose of avoiding his liability to the company or its creditors is fraudulent and void, and he remains still liable. The English cases, it is admitted, give effect to such transfers, if they are made (as it is called) "out and out;" that is, completely, so as to divest the transferrer of all interest in the stock. But even in them it is held that if the transfer is merely colorable, or, as sometimes coarsely denominated, a sham—if, in fact, the transferee is a mere tool or nominee of the transferrer, so that, as between themselves, there has been no real transfer, "but in the event of the company becoming prosperous the transferrer would become interested in the profits, the transfer will be held for naught, and the transferrer will be put upon the list of contributories." (*Williams' Case*, Law Rep., 9 Eq., 225, note, where the transfer was, as in the present case, made to a clerk of the transferrer without consideration; *Payne's Case*, Id., 223; *Kintrea's Case*, Law Rep., 5 Ch., 95. See, also Lindley on Partnership (2d ed.), p. 1352; *Chinnock's Case*, 1 Johns. Ch. (Eng.), 714; *Hyam's Case*, 1 De G., F. & J., 75; *Budd's Case*, 3 Id., 296.) The American doctrine is even more stringent. Mr. Thompson states it thus, and he is supported by the adjudicated cases: "A transfer of shares in a failing corporation, made by the transferrer with the purpose of escaping his liability as a shareholder, to a person who, from any cause, is incapable of responding in respect to such liability, is void as to the creditors of the company and as to other shareholders, although as between the transferrer and the transferee it was out and out." (*Nathan v. Whitlock*, 9 Paige (N. Y.), 152; *McClaren v. Franciscus*, 43 Mo., 452; *Marcy v. Clark*, 17 Mass., 329; *Johnson v. Laflin*, by Dillon, J., 6 Cent. Law Jour., 131.)

> The case in hand does not need the application of so rigorous a doctrine. While the evidence establishes that the Crescent City was in a failing condition when the transfer to Waldo was made, and leaves no reasonable doubt that the Germania Bank knew it and made the transfer to escape responsibility, it establishes much more. The transfer was not an out and out transfer. The stock remained the property of the transferrer. Waldo was bound to retransfer it it when requested, and all the privileges and possible benefits of ownership continued to belong to the bank. No case holds that such a transfer relieves the transferrer from his liability as a stockholder. We are, therefore, compelled to rule that the decree of the circuit court against the Germania Bank was correct. Its case, no doubt, is a hard one, but it is not in our power to give relief without a sacrifice of the well-established rules of law and equity, both in this country and in England.

The attention of the court is directed to the fact that the supreme court cites with approval the doctrine laid down in Thompson on Liability of Stockholders, but says it is not necessary to apply such rigorous doctrine. The clear inference is that the court would have applied the rule stated by Mr. Thompson had it been necessary to do so. In fact the court say on page 632:

> *A transfer for the mere purpose of avoiding his liability to the company or its creditors is fraudulent and void and he remains still liable.*

In *Richmond v. Irons*, 121 U. S., 48, the court sustains our contention. One of the defendants, Charles Comstock, admitted in his answer that previous to the year 1872 he was the owner of 150 shares of stock; that on the 8th day of February, 1873, he sold and assigned fifty shares of stock to Ira Holmes, and in June, 1873, fifty to Preston J. Maynard; that he endeavored repeatedly to have the stock transferred on the books of the bank, but that Maynard refused to allow

it to be done; that at the time of making said transfers he believed the bank to be solvent; that on September 23, 1873, he sold and assigned to Ira Holmes another fifty shares of stock; that he at that time believed the bank was able to pay all of its debts. The stock books introduced in evidence show that fifty shares of this stock were transferred September 23, 1873, fifty more September 24, 1873, and fifty more were canceled on the last date. The bank became insolvent on September 23, 1873, and went into voluntary liquidation September 26, 1873. The court say:

> As to the fifty shares of stock sold by Comstock to Holmes on September 23, 1873, we think the conclusion cannot be resisted that the transaction was made in contemplation of the insolvency of the bank, and, although both parties may have believed that the bank would ultimately be able to pay all of its debts, notwithstanding this transaction, we think that, as against creditors, it was fraudulent in law, and to that extent Comstock is chargeable as a shareholder. The sale of fifty shares in February, 1873, and the other fifty shares in June, 1873, there is no reason to suppose were not made in entire good faith, and without any expectation on the part of the parties of the insolvency of the bank. Notwithstanding that, Comstock continued to be upon the books of the bank the owner of these shares until September 23 and September 24, when they were respectively transferred.
>
> By section 5139 of the Revised Statutes, those persons only have the rights and liabilities of stockholders who appear to be such as are registered on the books of the association, the stock being transferable only in that way. No person becomes a shareholder, subject to such liabilities and succeeding to such rights, except by such transfer; until such transfer the prior holder is the stockholder for all the purposes of the law. It follows, therefore, that Charles Comstock, in respect of the shares sold by him in February and June, 1873, was the statutory owner on the 23d day of September, 1873. His liability as such stockholder is the same as if he had that day sold and transferred the stock to Ira Holmes, *but such a sale and transfer could only have been made that day by Com-*

stock, who was himself a director, in contemplation and actual knowledge of the suspension of the bank; it would operate as a fraud on the creditors, an effect which the law will not permit.

It will be noticed from reading this case that the court holds, at least inferentially, that it is not necessary to transfer the stock to an irresponsible person; that it is not necessary that the transfer be collusively made, but that the liability remains with the original holder of the stock if he sold the stock or transferred it in contemplation, and with actual knowledge of the impending suspension of the bank. If he does it for such purpose, and with such knowledge, it is a fraud upon the creditors of the bank.

Davis v. Stevens, 17 Blatchf., 259.
Bundy v. Cocke, 128 U. S., 185.
Johnson v. S. W. R. R. Bank, 3 Strobh. Eq. (S. C.), 263.
Nathan v. Whitlock, 9 Paige, 152.
McClaren v. Franciscus, 43 Mo., 452.
Marcy v. Clark, 17 Mass., 329.

In *Johnson v. Laflin*, 5 Dillon, 86, Judge Dillon says:

> While we maintain the right of the shareholder to dispose of his shares, absolutely, by out and out sale, and registered transfer and thus escape liability, provided the sale is made *bona fide*, and the purchaser is in law capable of assuming the liabilities of the transferrer, *yet this does not involve the right to transfer shares for a fraudulent purpose, or under circumstances which the transferrer knows will make the transfer, if it if sustained, work a fraud upon the other shareholders, or upon the creditors of the bank.*

In *Marcy v. Clark*, 17 Mass., 334, Chief Justice Parker says:

> We cannot doubt then that the transfer of an interest in the stock of such corporation not *bona fide*, but for the purpose of defeating the creditors of the company, is fraudulent and void.

Wait on Insolvent Corporations, 574.
Pauly v. State Loan & Trust Co., 165 U. S., 606.
Sykes v. Holloway, 81 Fed. Rep., 432.

II.

That the transfer of the stock by Stuart to Gruetter & Joers was made when the bank was insolvent is conclusively established by the evidence.

Kent K. Hayden, receiver of the bank, testifies that he was appointed and entered upon his duties as receiver June 1, 1893. (Record, 94.)

He has been connected with national banks for twenty-three years, and has successively occupied the position of messenger, book-keeper, teller, cashier, and United States bank examiner, and is an expert accountant.

The order for the assessment of the stock by the comptroller was made June 10, 1893. The respondent Stuart purchased one hundred shares of stock in the Capital National Bank November 1, 1884, and fifty shares of stock July 1, 1886. He was a stockholder from said dates to the 3d day of January, 1893, when the certificates were returned to the bank and reissued to the firm of Gruetter & Joers. (Record, 94, 95.)

The bank closed its doors January 21, 1893. (Record, 97.)

Due demand for payment of the stock assessment was made, but the same has not been paid (pp. 97, 98).

General Character of Assets.

Mr. Hayden testifies that the bills receivable on hand

amounted to $519,600, and those not on hand amounted to $141,000. (Record, 99, 100.)

Of the bills receivable on hand, $58,596.82 were good, $141,393.27 were doubtful, and $319,611.90 were worthless.

Of the bills receivable not on hand, all were worthless except about $10,000. (Record, 102.)

Worthless Notes.

There were on hand at the date of the failure of the bank worthless notes of R. C. Outcalt, cashier, to the amount of $58,091; of C. W. Mosher to the amount of $84,294.48; of E. W. Mosher to the amount of $97,658; Western Manufacturing Company notes to the amount of $125,000, and Marsh notes $17,000. Mr. Hayden also enumerates a number of other notes that were worthless. (Record, 102, 103.)

Maturity of Notes.

Of the $141,000 of notes outstanding in the hands of other parties than the receiver of the bank $2,000 matured in 1886, $7,827 matured in 1887, $7,886 matured in 1888, $10,650 matured in 1890, $40,600 matured in 1891, and $27,452 matured in 1892. (Record, p. 104.) The overdue paper in the bank January 3, 1893, the day the stock was transferred, was $75,027.98. (Record, 119.)

Rediscounts.

The bank had outstanding rediscounts $331,359, and on this amount the bank is liable for $143,000, the makers being worthless to that extent. (Record, 104.)

Total Liabilities.

The total labilities of the bank are $1,463,013.17. The

total assets about $900,000. Claims allowed, $849,109. Not allowed, $613,903.70. (Record, 105.)

Certificates of Deposit.

The total amount of certificates of deposit outstanding is $511,149. The amount shown by the books is only $97,301, a difference of $438,048. Certificates allowed, $356,149.49. Of these certificates allowed the books show $86,265.70. (Record, 105, 120.)

Manipulations.

The certificate of deposit register shows the greater number of manipulations, and for larger amounts. There is a great discrepancy between the amounts entered in this book and the certificates issued. (Record, 105, 106.)

The discrepancies between the amounts of the certificates of deposit and the entries in the certificate of deposit register are as follows:

Number.	Amount of Certificate Issued.	Amount Entered in Register.
25097	$50,000 00	$50 00
25047	37,975 00	975 00
24896	7,000 00	1,000 00
24981	2,000 00	20 00
24941	10,000 00	5,000 00
25636	50,000 00	100 00

(Record, 105, 106, 107.)

Bad Debts.

There were no bad debts charged off the books from the organization of the bank up to the 2d of February, 1892, when $30,000 of the surplus was charged off. During the first year the bank, by the failure of Donnell, Lawson &

Simpson, bankers of New York City, lost $30,300. (Record, 107.) There are a number of other losses mentioned by Mr. Hayden in his testimony. (Record, 107, 108, 109, 110.)

Interest Paid Account.

The bank kept an account called the "Interest Paid Account," in which were debits of interest paid by the bank on deposits received, and it also had an "Interest Account," in which were credited interest received on money loaned. There should be no credits in the "Interest Paid Account," all credits appearing in the "Interest Account," yet we find that on December 29, 1884, the "Interest Paid Account" was credited with $813, and successive credits were made from time to time from that date until in 1892 there appears one entry as high as $14,000. These credits were given about the time dividends were paid. On account of the large amount of money on deposit for which the bank was paying interest, no dividend could have been returned except for these fictitious entries of credit. These credits amounted, all together, to $108,916.44. (Record, 110, 111, 112.)

False Entry of $100,000 in Individual Ledger Account.

On December 24, 1889, the individual ledger account, in which were entered the deposits of creditors of the bank, and which contained the account of J. E. Hill, state treasurer, was credited with $100,000, without any money having been paid into the bank. This increased the liability of the bank $100,000 more than the bank had apparent assets to cover. By this entry the books were thrown out of balance for three years. (Record, 114.)

Other Manipulations.

April 25, 1891, the certificate of deposit account was

charged $100,000 and a certificate of deposit issued to J. E. Hill for $100,200. This certificate in fact was never delivered to Hill, but it enabled Mosher to draw out and use for his private purposes $100,000. (Record, 115.)

Western Manufacturing Company Paper.

The Western Manufacturing Company was not a company in fact, but was simply a name used by C. W. Mosher. Under that name he had formerly been engaged in a manufacturing business, but six or seven years ago he sold out that business to a corporation which was organized and took the same name, of which M. D. Welch was manager, and which was a solvent concern with high credit. Mosher caused notes to be issued in the name of the Western Manufacturing Company, signed by E. Hurlbut, Jr., for $755,000 which were negotiable with eastern banks and were renewed from time to time, so that there was on hand, at the failure of the bank, $125,000 in the bank and $110,000 held by other banks, on which the Capital National Bank was endorser. The Western Manufacturing Company was a fictitious concern and its notes were absolutely worthless. (Record, 116, 117.)

Reports to the Comptroller.

From time to time numerous reports were made to the comptroller of the currency, which were prepared by Mosher and verified or attested by the directors. A large number of these were signed by respondent Stuart. They were nearly all of them false, and a slight examination of the books would have shown this fact. (Record, 118.)

Overdrafts.

The overdrafts in the bank at the time respondent Stuart sold his stock, December 16, 1892, were $33,767.20. (Record, 119.)

In the report of September 30, 1892, signed by Stuart, the suspended and overdue paper was $43,686.54; liability of directors, $17,898.72, and the loans exceeding the limit were as follows: E. W. Mosher, $48,950.28; J. W. Small, $56,752.53. In addition there were scheduled as being owned by the bank a large amount of land—in York county, 2,000 acres; in Hamilton county, 400 acres—to secure an indebtedness of $38,617.92; estimated value of the property, $65,000. Also lands in Nuckolls county, 1,280 acres, and in Clay county, 900 acres, to secure a loan of $56,752.53; estimated value of property, $75,000. (See record, Exhibit 74. See Stuart's testimony, 35.)

The above summary of the facts in the record establish the insolvency of the bank at the date of the transfer of the stock.

III.

Stuart being a director of the Capital National Bank and a member of the finance committee and in daily attendance at the bank, with access to the books, is charged by the law with knowledge of its insolvency.

The evidence shows that Stuart was a stockholder and director of the bank from the date of its organization. As a member of the finance committee it was his duty, as it was his custom, to examine the paper of the bank once every three months. He was at the bank almost every day, and frequently examined the books containing the interest received account, so as to approximate the amount of the next dividend. He attended nearly every meeting of the board of directors, and in almost every case the dividend declared was made on his motion. He signed nearly all the reports

made to the comptroller purporting to show the full, complete, and exact condition of the bank at the close of business of the day named inthe comptroller's call. He signed a special report to the directors stating that he had examined the affairs of the bank and found them in good condition. Moreover, he knew that no losses or bad debts had ever been charged off during the whole history of the bank until a short time before the failure of the bank, when the surplus was wiped out by order of the bank examiner.

In view of Stuart's position in the bank, and his attitude as an officer, and his opportunity for finding out its exact condition, will the court allow him to evade liability upon his disclaimer of actual knowledge of the bank's insolvency? Will it allow him to say: I was asleep during all these years and ignorant of the bank's condition? It seems to us the court must say: It was your duty to be awake and vigilant. You were not put there to be a figure-head, to vouch for the institution, but as a guardian of the money of the depositors. The patrons of the bank deposited their money on the faith that you would be watchful of their interests, and you cannot now plead your own wrong to evade responsibility, or escape liability by a plea of ignorance that could only arise from a total abdication by you of your powers, duties, and functions as an officer of the bank. However well the frauds of the officers were concealed from the depositors and creditors (as they undoubtedly were), they were readily discoverable by, if not patent to, the directors. The books contained numerous false entries and fraudulent manipulations, and the bad paper and worthless bills receivable and overdue notes reached astonishing figures.

Can Mr. Stuart willfully shut his eyes to these facts and circumstances, extending over a period of ten years, during which he received $15,000 and more in unearned dividends.

and then at the last moment (twenty days before the failure of the bank), when the concern was tottering to its fall, evade his statutory liability by a disclaimer of knowledge or the plea of dense and profound ignorance? If so, then the law puts a premium upon gross negligence and willful disregard of duty.

Gibbons v. Anderson, 80 Fed. Rep., 348.

We therefore earnestly contend in this case, whatever may be the rule in other cases under different facts and circumstances, that the law impute knowledge of the wrecked condition of the bank to Stuart at the time he transferred his stock to Gruetter & Joers.

The language of Chief Justice Beasley in *Williams v. Mackay*, 40 N. J. Eq., 179, is appropriate:

> I entirely repudiate the notion that this board of managers could leave the entire affairs of this bank to certain accredited men and then, when disaster to the innocent and helpless *cestui que trustent* ensued, stifle all complaints of their neglect by saying, we did not do these things, and we know nothing about them. * * * The misconduct in question was manifest in every instance, and it is not easy to imagine how they, or some of them, failed to be discovered by these boards of managers on a suspicion which in their favor the law will make that they exercise their office in this respect with a responsible degree of vigilance. *The neglectful acts in question cannot be regarded by the court as isolated instances, for they run through the whole period of the institution, and thus evince a systematic and habitual disregard of the directions of the company's charter and their striking indifference to the security of the money held in trust.*

The supreme court in *Martin v. Webb*, 110 U. S., 7, has said:

> Directors cannot in justice to those who deal with the bank, shut their eyes to what is going on around them. It is

their duty to use ordinary diligence in ascertaining the condition of its business and to exercise reasonable control and supervision of its officers. *They have something more to do than from time to time to elect the officers of the bank and to make declarations of dividends.* That which they ought by proper diligence to have known as to the general course of business in the bank, they may be *presumed* to have known in any contest between creditors and those who are justified by the circumstances in dealing with those officers on the basis of that course of business.

In *Cutting v. Marlor*, 78 N. Y., 454, Chief Justice Church, delivering the unanimous judgment of the court, says:

A corporation is represented by its president and managers. Their acts are its acts, and their neglect its neglect. The employment of agents of good character does not discharge their whole duty. It is misconduct not to do this, but in addition they are required to exercise such supervision and vigilance as a discreet person would exercise over his own affairs. *The bank might not be liable for a single act of fraud or crime on the part of an officer or agent, while it would be for a continuous course of fraudulent practice, especially those so openly committed and easily detected as these are shown to have been. Here was no supervision, no meeting, no examination, no inquiry.*

This case was referred to with approval in *Preston v. Prather*, 137 U. S., 604.

Hun v. Carey, 82 N. Y., 65.

Charitable Corporation v. Sutton, 2 Atk., 400.

In *Land Grant Company of Ireland v. Lord Fermoy*, L. R., 5 Ch., 763, Lord Hatherly said.

I am exceedingly reluctant in any way to exonerate directors from performing their duty, and I hold that it is their duty to be awake, and that their being asleep would not exempt them from the consequences of not attending to the business of the company.

Cook on Stockholders, 547 and 708.

Boone on Banking, 86.

In *Main v. Mill*, 6 Bissell, 98, Judge Blodgett says:

> The officers of a corporation are bound to know the condition of its affairs, and have no right to receive a dividend unless legitimately earned.

Stuart was both a director and stockholder, and the language of the supreme court in *Glenn v. Liggett*, 135 U. S., 546, is in point:

> As between creditors and stockholders it would seem to be singular if the stockholders could protect themselves from paying what they owe by setting up the default of their own agents.

In *Gibbons v. Anderson*, 80 Fed Rep., 348, the court say:

> The idea which seems to prevail in some quarters, that a director is chosen because he is a man of good standing and character, and on that account will give reputation to the bank, and that his only office is to delegate to some other person the management of its affairs, and rest on that until his suspicion is aroused, which generally does not happen until the mischief is done, cannot be accepted as sound.
>
> *Robinson v. Hall*, 63 Fed. Rep., 223.

Counsel for appellant cite *Briggs v. Spaulding*, 141 U. S., 133. That case does not controvert our contention, but supports it. I quote from the syllabus:

> Directors of a national bank must exercise ordinary care and prudence in the administration of the affairs of the bank, *and this includes something more than officiating figure-heads.* They are entitled under the law to commit the banking business, as defined, to their duly authorized officers, but this does not absolve them from the duty of reasonable supervision, *nor ought they to be permitted to be shielded from liability because of want of knowledge of wrong doing, if that is the result of gross inattention.*

Our claim here is that Stuart was nothing but a figure-head, and that his want of knowledge of wrong-doing and negligence, if his claim in that respect be true, was the result of gross inattention to his duties as a director, and therefore the law imputes to him, and charges him with, notice of the insolvent condition of the bank at the time he sold and transferred his stock.

IV.

Stuart had actual notice of the insolvency of the bank at the time he transferred his stock.

It is, however, not necessary for us to rest our case on the above proposition that Stuart was bound to take notice of the condition of the bank, for we confidently affirm that Stuart had actual notice of the insolvent condition of the bank.

The statement of the appellant, that there is no evidence to show that he had actual notice of the insolvent condition of the Capital Bank, finds no support in the record.

In the first place, the appellant is an intelligent, educated man, formerly a professor, connected with Harvard University and other institutions (see page 39 of record), was a money loaner, and handled large sums of money, and was, therefore, well qualified to understand the bearing of the facts which came to his knowledge concerning the management and condition of the bank.

He was, in fact, a financial expert. For ten years he was a director of the bank. He was a member of the finance

committee, whose particular duty it was to examine and scrutinize the paper of the bank and report its condition to the directors. The evidence shows that he knew that the bank held a large amount of the paper of E. W. Mosher. (Record, 45.) In fact this paper of E. W. Mosher footed up to $97,658.85 (record, 102), and, as shown by the evidence of Mr. Hayden, was absolutely worthless.

In this connection we call attention to the fact that Professor Stuart testified that because C. W. Mosher had endorsed the E. W. Mosher paper, he considered it good (record, 45), but he elsewhere testified (record, 36) that he was dissatisfied with C. W. Mosher and his methods and believed "he was not the kind of a man to manage their money."

Again, the appellant knew of the loss to the bank resulting from the failure of Donnell, Lawson & Simpson, $30,300. (Record, 41.)

He was cognizant of losses occasioned by the failure of the Sherman County Banking Company, $14,000. (Record, 42.)

He knew that from $40,000 to $50,000 of the bank's money was tied up in real estate in Nuckolls and Clay counties. (Record, 43, Exhibit 74.)

He knew of the worthless Marsh paper to the extent of about $30,000. (Record, 49, 50.)

Stuart was acquainted with the Western Manufacturing Company paper (record 47), but could not remember whether there was in the bank $100,000 of this bogus paper.

On the morning of the failure of the bank he said to Mrs. King (record 136, testimony of Mrs. King):

> He did not like the way the bank had been doing for a long time. He did not like their going into the Western Manufacturing business, and he said he had talked with Mosher about it, and he did not like the Arkansas business, and he said they went into the skating rink business and he said he then felt mad, and he said this is not banking, and then, when they went into the base ball business he said it must be stopped; that we must stop that and do a banking business and not run after these outside affairs. * * * I have known for quite awhile they had some bad debt such as very poor paper there, amounting to about $136,000, and I did not like the way they were doing. (See Stuart's testimony, record, 36.)

Again, page 137, Mrs. King says:

> *He [Professor Stuart] went on and told me about it; he said he had not liked the management of the bank, and felt anxious about it, and I asked him how long, and he said a long time. I asked him why the bank was not closed in the condition it was, and asked him if he did not know that the bank's capital was impaired, and he said that it was.* * * *

The above conversation took place the morning of the failure of the bank, and Professor Stuart's knowledge of the bank's condition had come to him as an officer of the bank, and not from outside rumor.

Again, in conversation with Mr. Gerner, three months before the failure of the bank (record, page 141), Professor Stuart said that about $140,000 of the bank's capital was tied up in land and that he did not like the way the bank was managed. Mr. Gerner says:

> I guess it was after he made the trade; either he told me about it, or I took occasion to remark "I see you made that trade, professor." "Yes," he says, "I did." He says, "As I

told you before, I don't like Mosher & Outcalt's way of doing business, and I shall prefer to manage my own affairs hereafter."

This shows that the prime consideration with the appellant in making the trade was to get rid of his stock in the bank.

It is evident that Stuart knew much about the condition of the bank three months before it closed.

Let us recapitulate the various items of knowledge of the appellant:

Paper of E. W. Mosher	$97,000 00
Paper of Donnell, Lawson & Simpson	30,300 00
Paper of Sherman County Banking Company	14,000 00
Nuckolls and Clay county land, capital locked up	50,000 00
Marsh paper	30,000 00
Western Manufacturing Company paper—will not testify—he did not know	100,000 00
Total	$321,300 00

The capital of the bank was $300,000. The knowledge of $271,000 of worthless paper, and $50,000 tied up in land, must have created a suspicion in the mind of Stuart that the bank was in a failing condition even if he had not "actual notice" of that lamentable fact.

There is further evidence of a most convincing character that the appellant had full knowledge of the crippled condition of the bank.

In the record, between pages 206 and 207, will be found copies of the reports of the condition of the bank, made to

the comptroller of the currency, showing its condition September 25, 1891, December 2, 1891, March 1, 1892, May 17, 1892, and September 30, 1892. Each of these reports is attested by the appellant as director.

It cannot be said with any degree of plausibility that appellant did not have actual notice of the matters contained in these reports attested by him; nor should he be permitted to disclaim such notice. The report of September 25, 1891, shows that there were (see record, 206, Exhibit 70):

Bad debts	$12,000 00
Other suspended and overdue paper	37,461 92

The report of December 2, 1891, shows (record, 206, Exhibit 72):

Bad debts	$14,000 00
Suspended and overdue paper	39,847 92

The report of March 1, 1892, shows (record, 206, Exhibit 71):

Suspended and overdue paper		$87,643 19
Loans exceeding lawful limit	E. W. Mosher	50,950 28
	J. W. Small	51,752 53

The report of May 17, 1892, shows (record, 206, Exhibit 73):

Suspended and overdue paper		$36,484 01
Loans exceeding lawful limit	E. W. Mosher	48,950 28
	J. W. Small	51,752 53

The report of September 30, 1892, shows (record, 206, Exhibit 74):

Suspended and overdue paper		$43,686 54
Loans exceeding lawful limit	E. W. Mosher	48,950 28
	J. W. Small	56,752 53

These reports were all signed and attested by Stuart.

It seems that after the report of December, 1891, there were no bad debts reported, although Mr. Hayden testifies (record, 116) that of the bills receivable in the bank at suspension $319,611.91 were worthless.

U. S. v. Allis, 73 Fed. Rep., 165.
U. S. v. Allen, 47 Fed. Rep., 699.
Finn v. Brown, 142 U. S., 56.

Moreover, a person is in equity charged with knowledge of facts of which he is not actually cognizant, when put upon an inquiry which would lead him to the facts if intelligently and diligently pursued. Counsel for the appellant would certainly not impute to his client ignorance of suspicious circumstances, which, if intelligently pursued, would have led to a knowledge of the bankrupt condition of the bank at the time Stuart sold his stock.

V.

The evidence is clear that Stuart transferred his stock with intent to escape liability.

In addition to the almost conclusive presumption, that, with full knowledge of the insolvent condition of the bank, the transfer made by Professor Stuart was made with intent to relieve himself from his statutory liability, we have his statements which virtually admit that he made the trade with Gruetter & Joers because he could thereby get rid of his bank stock. We quote from testimony of Henry Gerner (record, 141):

> Well, one afternoon I met the professor, which was an almost daily occurrence, if I did not see him in the bank I met

him on the street, and we passed the compliments of the day, and some remarks, and one day in one of our conversations and talks, he told me that he was contemplating a real estate deal. I said, "yes, yes." He says he had a proposition made him to purchase the Gruetter block down here, and it was a trade, and he said if he made the trade at all, it would be trading his bank stock and some money, and assuming their liabilities, their obligations, a mortgage on the building for $30,000. I told him I thought it was rather an exorbitant price for the property, that I did not consider the building worth any such money; to which he responded that they were going to take a very good lease, they would take it for ten years,—a ten-year lease on the premises at a rental of $6,000 a year. I told him I did not think it was possible for those men in the business to pay any such rent; it was too risky. "Well," the professor replied, "we have to take some risk." "Well," I said, "I should rather, if I was in your place hold my stock and my interest in the bank. I think it is better or safer." *He said he did not like the way they were doing business; he did not like the style, and a large share of the bank's capital was tied up in real estate, and there was no prospect of dividends and he preferred to do his own business and manage his own affairs.*

Question. Did you have any subsequent conversation with him about the matter?

Answer. Well, yes. I guess it was after he made the trade; either he told me about it, or I took occasion to remark, "I see you made that trade, professor." "Yes," he says, "I did." He says, "As I told you before, I don't like Mosher & Outcalt's way of doing business, and I shall prefer to manage my own affairs hereafter."

In each conversation Professor Stuart makes prominent his dissatisfaction with the management of the bank, and shows plainly that his real motive in making the trade was to rid himself of the stock. Subsequent developments, showing the rottenness of the bank, then known to Professor Stuart, indicate that his dissatisfaction with the bank was greater than he made known to Mr. Gerner.

Of peculiar significance in this connection is the subseuent transfer by Professor Stuart of all of his real estate. It tends to show his animus in the entire transaction. It throws a back light on all his antecedent acts. After unloading his stock to Gruetter & Joers, and after the failure of the bank, to make "assurance doubly sure" that he would escape liability, he made pretended conveyances of all of his real estate to one Holland. It is only necessary to read Professor Stuart's testimony on the subject of these conveyances for one to be convinced that they were without consideration, and made for the sole purpose of covering up his property. His answers on cross-examination also show his disingenuousness and lack of candor. We quote from record, pages 82 to 92 inclusive:

> I was the owner of real estate at that time in Lincoln, Lancaster county, to the value of about $150,000.
>
> Q. Now, who has the title to all that property?
>
> A. Charles Holland.
>
> * * * * * * * * * * *
>
> Q. What was your object in conveying this property to Holland, any way? What was the purpose of it?
>
> A. Well, I decline to state what my purpose was.
>
> Q. *Was not your real purpose in conveying this property to Holland to defeat the collection of any suits that might be brought against you by the receiver of the Capital National Bank at any time, arising out of your connection as a director and stockholder of the Capital National Bank?*
>
> A. *I don't know but that a man would be justified in doing that. I don't say that was my motive, however.*
>
> Q. *Was not that your motive, professor?*
>
> A. *I decline to say. It is going into things which it seems to me are not particularly pertinent to this examination.*

It is worthy of note that since the giving of the above testimony Stuart has reconveyed under his power of attorney from Holland all of his lands to himself. See affidavit to appeal bond filed herein. (Record, 241.)

The ostensible consideration for the conveyance from Gruetter & Joers to Professor Stuart of the business block was $67,500, but Professor Stuart testifies (record, 70) that $60,000 would have been a pretty fair price at that time for the building and lease, which goes to show that he considered he was receiving $10,500 for his stock, which he claimed was worth $18,000, at which price he put it in the trade.

The other consideration consisted of the mortgage of $30,000, which Professor Stuart [illegible]sumed, and of $19,500 cash. There could be no discount [illegible]either of these two items, so that the discount of $7,500 [illegible]essarily falls upon the bank stock, so that the appellant stands in the position, by his own showing, of having sold his bank stock, which he claimed was worth $18,000, for $10,500.

This transaction shows that he, in fact, had knowledge of the bank's insolvency, and hence was willing to assume a large mortgage of $30,000 and pay out a large sum of money in cash, for the apparent purpose of getting rid of his bank stock at a large discount. It is not to be believed that this experienced banker, and educated business man, would have done this, except for his great anxiety and determination to get rid of his bank stock, and the liability to pay an assessment. The transfer was unquestionably "made to escape an impending calamity."

We think we have clearly shown from the facts appearing in the record that the appellant made this transfer for the purpose of escaping his statutory liability. We therefore are not compelled to rely upon the presumption expressed by the court in *Miller v. Great Rapids Ins. Co. et al.*, 50 Mo., 55, that

If a stockholder knew of the insolvency at the time of the transfer, it would be very strong evidence of fraud, and it would be hard to resist the conclusion that such transfer was made in bad faith.

VI.

Gruetter & Joers were insolvent or financially incapable of paying the stock assessment

We have shown that the bank was a wreck; that Stuart knew its failing condition; that he made the transfer in contemplation of its insolvency and to escape a liability *that had already attached to the stock, and for which suit would have then been instituted had the comptroller known the bank's true condition.*

Since the organization of the bank Stuart had been both a stockholder and director and had been the beneficiary of the large dividends that were fraudulently declared. It would seem most just and equitable, and the rule a salutary one, that he bear the burden put upon the stock by his own misconduct and gross negligence. The receiver proceeded upon the theory that Stuart *ought in equity* to pay this assessment, because by taking unearned dividends and by his gross neglect of duty he caused the liability in question to attach to the stock. The receiver is pursuing the wrongdoer and not his victim.

Must a creditor of the bank or his representative, the receiver, when he finds that a solvent stockholder, taking advantage of the knowledge afforded by his position as an officer, has attempted to escape a liability which he has by his own wrongful acts fastened on the stock, take an inventory of the worldly effects of the transferee and strike a bal-

ance of his assets and liabilities and ascertain his insolvency, before he can sue the transferrer of the stock? The test is whether the creditors are put in a worse position by the transfer; if so, the transferrer of the stock remains liable for the assessment.

The right of the receiver to sue the transferrer does not rest upon the insolvency of the transferee, but upon the *fraud* of the transferrer. It is the *fraudulent intent* of the transferrer that avoids the transfer and not the *insolvency* of his victim. If a transferrer of stock, without intent to evade a stock liability, and without knowledge of the insolvency of a company, sells his stock, then the right to proceed against the innocent transferrer might depend upon the question whether the vendee of the stock was insolvent, but the rule is different where the transfer is made in contemplation of insolvency and to escape liability. In *Bowden v. Johnson, supra*, the supreme court say:

> As such shareholder he became subject to the individual liability prescribed by the statute. This liability attached to him until, without fraud as against the creditors of the bank, for whose protection the liability was imposed, he should not relieve himself from it.

In *Sykes v. Holloway*, 81 Fed. Rep., 438, the court say:

> It seems to us upon principle the pecuniary condition of the transferee of stock in a national bank at the time of transfer, while material upon the inquiry of whether or not the transfer is *bona fide* or colorable, cannot be a decisive element on the question of the liability of the transferrer where the transfer has been made out and out without notice or knowledge of the failing condition of the bank.

The case at bar is much stronger than the one cited, because the transfer was made in contemplation of the insolvency of the bank.

In *Foster v. Lincoln*, 74 Fed. Rep., 382, the court, by Wheeler, district judge, says:

> In *Johnston v. Laflin*, 103 U. S., 804, Mr. Justice Field, in speaking of the entry of the transfer on the books of the bank, said: "It is necessary to protect the seller against subsequent liability as a stockholder." Creditors of the bank, when becoming such, have a right to rely upon the responsibility of the shareholders, as shown by the books at that time. The defendant, Benjamin F. Lincoln, appears to have been under liability to the creditors of the bank when this transfer was made. These statutes seem to intend that this liability should not be impaired by transfer, and especially should it not be by a transfer merely voluntary.

In *Cox v. Montague*, circuit court of appeals, sixth circuit, 78 Fed. Rep., 845, the court say:

> It is not necessary, in order to hold liable for an assessment upon the shareholders of an insolvent national bank one who has transferred his stock to an irresponsible person, to show that the transferrer had actual knowledge of the insolvency of the bank at the time of the transfer, but it is sufficient if he had good ground to apprehend its failure, and made the transfer with intent to relieve himself from individual liability.

The supreme court lays down the proper rule in *Bowden v. Johnson:*

> That is no reason why Johnson should not *at the election of the creditors* still be treated as a shareholder—he having, to escape liability, perpetrated a fraud on the statute.

It is not necessary for us to rest our case on the proposition here advanced, as the insolvency of Gruetter & Joers is clearly and convincingly established.

Mr. Gruetter, in answer to the question as to his insolvency, used the following language:

> Counting the bank stock as worthless, and assuming that

we should be liable for the assessment of $15,000, we could not have paid. *That is to say, if we counted the bank stock as worthless we might have had about $3,000 to pay the $15,000 assessment with, provided that our stock which we had at that time in the corporation was worth dollar for dollar. But if it had been necessary by suit to realize money out of the assets we would have been out at least $10,000 instead of being able to pay the assessment.*

Q. You may state whether the firm of A. T. Gruetter & Co. and the persons to whom this stock was transferred by respondent Stuart would be able at the present time to pay this assessment of one hundred cents on the stock, or any part if it, in event that suit was brought and judgment obtained.

A. *No, sir.* (Record, 148.)

On cross-examination the following questions and answers were given:

Q. Was the firm of A. T. Gruetter & Co. solvent before they made this trade?

A. Yes, sir, they were.

Q. And could have paid their debts?

A. Yes. (Record, 150.)

This evidence is somewhat explained and qualified on further cross-examination:

Q. Gruetter & Joers were apparently solvent, were they not, on the 7th day of December, 1892?

A. *If we collected and sold our stock for what it was worth at regular prices we could pay our debts; yes, sir.*

Q. And you would not have been insolvent then if you had not been disturbed in the ordinary and regular course of business?

A. A. T. Gruetter & Co.? No, sir.

Q. And you have not been disturbed in the ordinary and regular course of business have you, as you went out of business?

(No answer.)

Q. Are the debts of A. T. Gruetter & Co. discharged?

A. No, I am sorry to say, they are not. We intended to sell the bank stock and take the proceeds and discharge them.

Q. How much were the debts of A. T. Gruetter & Co. at that time?

A. I could not tell you exactly, but we owed for merchandise bills $15,000 east, which had to be paid, and then we had to pay $1,000 commission to Crooks in making the sale, and we owed considerable for borrowed money to parties in Chicago and the bank here. * * *

Q. I understand you to say in your direct examination that if this stock paid out dollar for dollar, and you were permitted to conduct your business in the ordinary way, that the firm then would not be insolvent?

A. *Considering whether we were liable for the* $15,000, *if we were not liable for that, then of course we could pay out, but if we were called upon to pay the* $15,000, *we would have been busted right away.* (Record, 152.)

In redirect examination Mr. Gruetter testified as follows:

Q. Mr. Gruetter, can you tell what the liabilities were, approximately if not accurately, of Gruetter & Joers at the time you purchased this stock?

A. Well, what would you want me to include? The mortgages?

Q. Yes, include everything. If you have a memorandum you may refresh your memory from that. * * *

A. Of course it would be hard for me to give you the correct figures unless I turn to the books; of course I can tell by looking at the books, *but as near as I can recollect it must have been* $90,000 *which we owed.*

Q. That includes the mortgage on the building, does it?

A. Yes, sir.

Q. Do you remember how much you owed the First National Bank?

A. $20,000.

Q. You owed $15,000 for merchandise, and $1,000 for commission. Was there any more than that?

A. Yes, there was a good deal more of borrowed money. We owed $7,500 to Louie Meyer at that time.

Q. Were you surety or indorser on any paper that you have since paid?

A. I paid $5,000 for my brother-in-law as security.

Q. Were you on that paper at that time?

A. Yes, sir.

Q. Did you owe any other bank than the First National Bank?

A. Not a bank; it was mostly private parties we owed. (Record, 154.)

A careful reading of all Gruetter's testimony proves that the transferees of the stock were insolvent and financially incapable of responding to the assessment of the stock.

They were owing, including the mortgage, about $90,000. (Record, 154.) Stuart assumed $30,000 and paid them $19,500 in cash, which would wipe out $50,000 of their indebtedness and leave $40,000 unpaid. Their merchandise was worth $30,000, so they lacked ten thousand dollars of having enough to pay their debts.

On pages 154, 155 of record Gruetter gives a partial schedule of his liabilities:

First National Bank	$20,000
Merchandise	15,000
Commission	1,000
Louie Meyer	7,500
Security debt of brother-in-law	5,000
Mortgage on building	30,000
Total	$78,500

These were not all the liabilities, as there were others due to private parties.

If we, however, accept the above figures as approximately correct, the account would stand as follows:

Stuart assumed the payment of	$30,000
Value merchandise	30,000
Money receied from Stuart	19,500
Total.	$79,500

This would leave a balance of about $1,500 to pay the stock assessment of $15,000. In other words, Gruetter testifies that the trade broke the firm and that they were unable to pay the assessment of $15,000, but could pay on the assessment from $1,500 to $3,000, *providing they could get dollar for dollar for their stock.*

It makes no difference whether Gruetter & Joers were insolvent before the trade or whether the purchase of worthless stock broke them. The important question is were Gruetter & Joers able to pay the assessment when called for by the comptroller. From the standpoint of the creditor it is not of the slightest import who or what caused the insolvency. If the stock had remained in the name of Stuart, the creditors could have recovered the assessment; now that it is in the hands of Gruetter & Joers, no recovery can be had against them, because they are financially irresponsible.

Counsel for Stuart makes the remarkable claim that we cannot recover because, but for the trade, Gruetter & Joers were solvent. This is pleading his own wrong as a defense. Stuart in effect asserts that Gruetter & Joers were solvent before the trade and at the time he unloaded the worthless stock on them, and therefore he sold the stock to a solvent transferee. The true logic of the transaction is this: Gruetter & Joers were solvent, but Stuart made them in-

solvent by imposing upon them a stock *liability*, instead of a stock *asset*, so that at the very moment that Gruetter & Joers took the stock they were insolvent. In other words, Stuart took from Gruetter & Joers part of their equity in the building exchanged, worth $18,000, and gave them nothing for it, thereby crippling their liability to pay their debts and made them insolvent.

The argument of counsel for appellant that Gruetter & Joers were entitled to count as an asset the amount recovered by them in this action, and that such asset made them solvent, is, to say the least, fantastical. It is not absurd for counsel for the appellant to assert that Gruetter & Joers can recover nothing from Stuart, and yet in the same breath assert that if the court finally decided against his client such decree is an available asset to Gruetter & Joers, which made them solvent at the date of the transfer of the stock?

It is the madness of logic to assert that the possibility of recovery—at best a contingent asset—should be taken into account by the court in determining the solvency of Gruetter & Joers. If the position of Stuart is correct, that he owes Gruetter & Joers nothing, is he not estopped from asserting that the receiver should treat it as a valuable asset? Is not the receiver justified in taking Stuart at his own word? In any event the receiver could hardly look upon this lawsuit as an asset until it was in decree and paid. Moreover, the chances of collecting it were exceedingly slim, as Stuart had put all of his property out of his hands to avoid all liabilities arising out of the failure of the bank. We therefore reassert our entire faith in the proposition that Gruetter & Joers were insolvent at the time they received the stock.

We have now shown conclusively that the bank was hopelessly insolvent; that Stuart sold his stock with knowledge

of its insolvency and with the intent to escape liability; that his transferees were insolvent. We were not required to go so far, but having done so, our case is made out and the decree should be affirmed. The findings of the lower court upon these questions are not to be lightly set aside, and only when the clear weight of the testimony is against them.

Metropolitan Nat. Bk. of Pittsburgh v. Rogers, 53 Fed. 779, and cases cited.
Evans v. Bank, 141 U. S., 107.
Furrer v. Ferris, 145 U. S., 132.
Betts v. Mugridge, 154 U S., 644.
Hill v. Woodbury, 49 Fed., 138.
Tyler v. Campbell, 106 U. S., 322.
Durand v. Martin, 120 U. S., 366.
Hewitt v. Campbell, 109 U. S., 103.
Hathaway v. First Nat. Bank, 134 U. S., 494.
Stuart v. Hayden, 72 Fed., 406.

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